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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, *ET AL.*,

Petitioners,

v.

SEATTLE AUDUBON SOCIETY, *ET AL.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

MOTION AND BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN IN SUPPORT OF AFFIRMANCE

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MOTION OF PUBLIC CITIZEN FOR LEAVE TO FILE A BRIEF IN SUPPORT OF AFFIRMANCE AS *AMICUS CURIAE*

Public Citizen is a non-profit organization that works to ensure government accountability. One means that Public Citizen has used to further this objective is advocating the position that the three branches of the federal government must abide by the constitutional doctrine of separation of powers. Of particular relevance to this case, Public Citizen attorneys have argued that Congress may not avoid political accountability by resorting to expedient shortcuts that evade the strictures of the doctrine of separation of powers. *See Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Metropolitan Washington Airports Authority v. Citizens for*

the Abatement of Aircraft Noise, 111 S. Ct. 2298 (1991).

The issue in this case is whether Congress exceeded its role by mandating a particular result in a pending case. Public Citizen believes that Congress's action usurped the role of the Judicial Branch. However, Public Citizen reaches this result by an analysis that produces a broader set of prohibitions than the court of appeals opinion or the positions of any of the parties on what Congress can do to achieve a particular outcome in a pending case. Thus, while the court of appeals drew the line between permissible legislative repeals or amendments on the one hand, and impermissible directions to courts commanding a particular result on the other, Public Citizen takes the position that the more appropriate dividing line is between laws of general applicability and case-specific ones.

Under this approach, Congress cannot constitutionally compel a particular outcome in a pending case, without adopting a rule of general applicability, regardless of whether it does so by explicitly directing the court to reach a particular result, or by couching that direction as a temporary exemption of the challenged actions from the unchanged requirements of the laws that form the basis of the challenge, or by eliminating the courts' jurisdiction to hear the case. Because the Constitution prohibits Congress from directing a court to reach a particular result in a pending case, Congress must not be permitted to accomplish the same result by using alternative language that makes no substantive change in the underlying legal standards.

Because Public Citizen is presenting a broader analysis than is being presented by the parties or the other *amici*, it respectfully asks the Court to grant it leave to file the accompanying brief as *amicus curiae* in support of affirmance of the judgment below.[1]

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[1] Respondents Association of O & C Counties and Benton County have not consented to this motion; respondents Seattle Audubon Society *et al*. have consented, and the other respondents and petitioners have not yet indicated whether they consent.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN IN SUPPORT OF AFFIRMANCE

INTRODUCTION AND SUMMARY OF ARGUMENT[1]

In three recent cases, this Court has admonished that Congress may not avoid political accountability by resorting to expedient shortcuts that evade the strictures of the doctrine of separation of powers. *See Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Metropolitan Washington Airports Authority v. Citizens for*

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[1] The interest of *amicus curiae* is set forth in the accompanying motion for leave to file this brief.

the Abatement of Aircraft Noise, 111 S. Ct. 2298 (1991). This case involves another such device by which Congress has attempted to dictate the result that a court must reach in a pending case, without changing the underlying legal standards. There is general agreement between the parties that the Constitution prohibits Congress from prescribing a rule of decision for a particular case. The issue addressed in this brief is whether Congress can evade this prohibition by resorting to clever legislative drafting.

While Public Citizen agrees with the result reached below, it embraces a broader rationale for finding that Congress exceeded its constitutional role. The court of appeals drew the line between permissible legislative repeals or amendments on the one hand, and impermissible directions to courts to reach a particular result in a pending case, on the other. However, under this dichotomy, Congress could repeal a portion or particular application of a statute, even if it were done only to the extent, and for the time, necessary to alter a particular judicial ruling in a pending case. Such a case-specific repeal presents all of the dangers of an explicit legislative direction of the same outcome.

Public Citizen urges the Court to draw a more appropriate dividing line between laws of general applicability and those that are case-specific only. Under that approach, Congress may compel an outcome in a case by changing generally applicable legal standards, but not simply for this case and the particular circumstances underlying it. Thus, Congress could not constitutionally compel a particular outcome in a pending case without adopting a rule of general applicability, regardless of whether it did so by explicitly directing the court to reach that result, or by couching that direction in an exemption of the challenged actions from the unchanged requirements of the laws that form the basis of the challenge, or by eliminating the courts' jurisdiction to hear the case. All of these legislative devices have the same impermissible purpose and effect: they place Congress in the position of dictating the outcome of a pending case without making any principled, substantive change in the underlying legal requirements. Because, as all of the parties agree, the Constitution prohibits Congress from directing a court to reach a particular result in a pending case, Congress must not be permitted to

accomplish the same result by using alternative language that makes no substantive change in the underlying legal requirements.

BACKGROUND

It is common practice for unsuccessful litigants to seek redress in Congress. In response to such constituent demands, Members of Congress frequently try to change the result of judicial decisions.

Under normal congressional procedures, the congressional committees with jurisdiction over the matter will review the decision, hold hearings, and develop legislation that alters the substantive standards of the underlying law to correct what Congress perceives to be flaws in the system. Future cases will be governed by the new legal standards, quite possibly with a different outcome than the case that spurred the change in the law.

Sometimes, however, Members of Congress seek to short-circuit committee review and the development of general changes in the underlying legal obligations. Instead, they devise a quick-fix solution, frequently in the form of an appropriations rider, that dictates a different result in a pending case without making any general changes in the underlying laws. Other Members of Congress tend to defer to the sponsors of case-specific riders. This tendency is especially pronounced where the rider is primarily of local concern, given the tradition of pork barrel politics and deference to local delegations on what are perceived to be local matters. As a result, these quick-fix measures evade any thorough analysis and avoid the political consequences of amending the underlying legal standards outright.

In the environmental law context, these case-specific riders have taken various forms. Some have directed that the challenged agency action go forward without any further action under the statute on which the action was challenged and found deficient. *See* Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, § 203, 87 Stat. 576, 584-85 (1973); Supplemental Appropriations Act for Fiscal Year 1985, Pub. L. No. 99-88, 99 Stat. 293, 340

(1985). Others have directed a particular agency action to go forward, "notwithstanding" the statutory requirements that a court had found were violated by the action, or "notwithstanding" an injunction issued by a court. Energy & Water Development Appropriation Act of 1980, Pub. L. No. 96-69, 93 Stat. 437, 449-50 (1979); Continuing Appropriations Act for Fiscal Year 1987, Pub. L. No. 99-591, § 114, 100 Stat. 3341-349 (1986); Supplemental Appropriations Act for Fiscal Year 1985, Pub. L. No. 99-88, 99 Stat. 293, 340 (1985).

Some of the more explicit riders have directed the courts to find particular facts or to deem the agency's action to meet the requirements of the law. For example, one rider directed that a draft environmental impact statement would be treated as a final one, notwithstanding the requirements of the law or court injunctions then in effect. Department of the Interior & Related Agencies Appropriations Act of 1989, Pub. L. No. 100-446, § 321, 102 Stat. 1774, 1827 (1988). Another rider provided that the requirements of certain laws "shall be deemed to be satisfied" by whatever unspecified actions had been taken by the agency with respect to the underlying matter. Arizona-Idaho Conservation Act of 1988, Pub. L. No. 100-696, §§ 602, 607, 102 Stat. 4571, 4597-99 (1988). Most such riders also provide that the previously challenged action no longer may be subject to judicial review. *See* Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, § 203, 87 Stat. 576, 584-85 (1973); Supplemental Appropriations Act for Fiscal Year 1985, Pub. L. No. 99-88, 99 Stat. 293, 340 (1985).

Congress followed this course of action with respect to the disputes underlying these cases. Although not at issue in this case, an earlier appropriations rider had responded to a lawsuit challenging petitioner Bureau of Land Management's ("BLM's") failure to prepare a supplemental environmental impact statement incorporating new information on the status of the spotted owl. That rider stated:

> Nothing shall limit judicial review of particular activities on these lands: *Provided, however*, That there shall be no challenges to any existing plan on the sole basis

> that the plan in its entirety is outdated, or in the case of the Bureau of Land Management, solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan: *Provided further*, That any and all particular activities to be carried out under existing plans may nevertheless be challenged.

Continuing Appropriations Act for Fiscal Year 1988, Pub. L. No. 100-202, § 314, 101 Stat. 1329-254 (1987).[2]

This rider derailed only one of many challenges to the BLM's timber sales program in public lands in Oregon that contain spotted owls. *See Portland Audubon Society v. Lujan*, 884 F.2d 1233 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1470 (1990); *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir.), *cert. denied sub nom. Northwest Forest Resource Council v. Portland Audubon Society*, 109 S. Ct. 3229 (1989). Subsequently, several environmental organizations filed a lawsuit challenging petitioner Forest Service's violation of numerous environmental laws in its timber sales program in public lands in the State of Washington on which spotted owls depend for their survival. *Seattle Audubon Society v. Robertson*, C89-160WD (W.D. Wash.). After the district court enjoined timber sales in certain public lands in Washington, *id.* (order, Mar. 1989), the timber industry protested vigorously to the public and to their Senators and Representatives. In response, Senators from Washington and Oregon introduced an appropriations rider to remove the injunctions in the two cases. The Senate amendment would have required timber sales to go forward in spotted owl habitat "notwithstanding any provision of law that is a basis for any stay, restraining order or injunction issued in" the two cases identified by caption and docket number. 135 Cong. Rec. S8776 (July 26, 1989). It also would have barred the courts from issuing any restraining order or injunction, or

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[2] This rider was reenacted without change in subsequent years. Department of the Interior & Related Agencies Appropriations Act for Fiscal Year 1989, Pub. L. No. 100-446, § 314, 102 Stat. 1774, 1825-26 (1988); Department of the Interior & Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, § 312, 103 Stat. 701, 743 (1989).

voiding any sale, in fiscal year 1990 with respect to such timber sales. *Id.*[3]

In the House of Representatives, there was strong opposition to insulating the agencies from the requirements of the underlying environmental laws and from judicial remedies. *See* Representatives' Letter of Sept. 11, 1989, reprinted as App. B to Respondents' Brief. As a result, the conferees substituted a straightforward direction to the courts that management of the public lands "according to" portions of the rider "is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases," which the rider then cites by caption and docket number. Section 318(b)(6)(A), Department of the Interior & Related Agencies Appropriation Act for Fiscal Year 1990, Pub. L. No. 101-121, tit. III, 103 Stat. 701, 747 (1989). Congress made this direction without exempting the agencies, the lands, or the spotted owl from the underlying environmental laws, and without otherwise modifying the requirements of such laws. To the contrary, the conference report explicitly states: "This section in no way alters application of the Endangered Species Act or other environmental laws to Forest Service or BLM management activities." Opp. Cert. App. 122a. The rider also did not remove judicial remedies generally, except for its bar on temporary relief, whose effect is tempered by the rider's direction to the courts to expedite such cases. Section 318(g). It appears that the conferees left the agencies subject to the requirements of the underlying environmental laws, but ensured that there would be no way for the public or the courts to enforce the most pertinent of those legal obligations -- those that had formed the basis of the previous challenges and that the courts previously had indicated had likely been violated.

The rider at issue in this case combines some of the worst features of case-specific lawmaking. There were no hearings, there was little debate, and the issues were resolved not by the

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[3] A floor amendment narrowed this remedies limitation to temporary relief, thereby permitting a court to void a sale after a trial on the merits. 135 Cong. Rec. S8791 (July 26, 1989).

committees with substantive jurisdiction, but by the appropriations committees, even though the rider had no significant fiscal consequences. Not only did Congress refuse to adopt any rules of general applicability, but it simply directed that whatever the agencies chose to do under the rider would be adequate during Fiscal Year 1990 for meeting the requirements of the laws that formed the basis of the existing court challenges. After that fiscal year, a court could again determine that the very same actions taken before, after, and possibly even during that year violated the same governing legal requirements. In other words, Congress passed a law applicable only to those activities of these two agencies that had been challenged in two specific cases, and then only for one fiscal year. In purpose and effect, this rider had no consequences other than to dictate the result for the pending lawsuits.

ARGUMENT

The Constitution divided "the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility." *INS v. Chadha*, 462 U.S. 919, 951 (1983). It is "a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power." *Springer v. Government of the Philippine Islands*, 277 U.S. 189, 201-02 (1928). Under this doctrine of separation of powers, "it is a breach of the National fundamental law . . . if by law [Congress] attempts to invest itself or its members with either executive power or judicial power." *Buckley v. Valeo*, 424 U.S. 1, 121-22 (1976) (per curiam). As this Court has repeatedly recognized, this doctrine serves "as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Id.* at 122; *see The Federalist* No. 48, at 308 (E. Earle ed. 1937) (J. Madison) ("none of [the branches] ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective

powers").

The Framers were particularly concerned that the Legislative Branch had the potential power to encroach on the Executive and Judicial Branches:

> Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the coordinate departments.

The Federalist No. 48, at 323 (E. Earle ed. 1937) (J. Madison). As this Court reaffirmed last Term:

> To forestall the danger of encroachment "beyond the legislative sphere," the Constitution imposes two basic and related constraints on Congress. It may not "invest itself or its Members with either executive power or judicial power." *J.W. Hampton Jr., & Co. v. United States*, 276 U.S. 394 (1928). And, when it exercises its legislative power, it must follow the "single, finely wrought and exhaustively considered, procedures" specified in Article I. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, 111 S. Ct. 2298, 2311 (1991) (footnote omitted). Both the separation of powers principle and the lawmaking requirements of the Bicameralism and Presentment Clauses serve as affirmative limitations on Congress's powers, the former by limiting Congress to lawmaking and related activities, and the latter by requiring Congress to act in a politically accountable manner through the constitutionally prescribed lawmaking process.

In Article III, the Constitution not only assigns the power to decide cases and controversies to the Judicial Branch, it also protects the independence of the Judicial Branch to ensure that such cases and controversies are resolved without interference

from the political branches. Thus, Article III provides that federal judges will have life tenure and that their salaries may not be diminished. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), this Court emphasized that the independence of the judiciary must be jealously guarded from outside interference and held that judges without both life tenure and protection against salary diminution could not exercise Article III judicial power. Similarly, the Court underscored the importance of these features of judicial independence in *United States v. Will*, 449 U.S. 200, 217-18 (1980), stating that "[a] Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government."

The division of responsibility between the Legislative and Judicial Branches ensures that the political lawmaking branch (in concert with the President) enacts the laws, but that the nonpolitical, independent Judicial Branch interprets and applies those laws to the cases and controversies brought by parties to the courts. Other parts of the Constitution reinforce this balance between the Legislative and Judicial Branches. Thus, under the Ex Post Facto Clause, Art. I, § 10, cl. 1, Congress may not enact a law that retroactively imposes punishment, *i.e.*, that changes the criminal legal consequences of completed acts. The purpose of this prohibition is to prevent Congress from enacting arbitrary or vindictive legislation. *Miller v. Florida*, 482 U.S. 423, 429-30 (1987); *Weaver v. Graham*, 450 U.S. 24, 29 (1981). Similarly, under the Due Process Clause, Congress may not arbitrarily or irrationally make laws retroactively applicable. *United States v. Sperry Corp.*, 110 S. Ct. 387, 396 (1989); *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 728-31 (1984); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-17 (1976). Likewise, the Bill of Attainder Clause, Art. I, § 10, cl. 1, prohibits Congress from legislatively determining guilt and inflicting punishment on an identifiable individual or group of individuals without the protections of a judicial trial and the political independence of the judiciary. *Nixon v. Administrator of General Services*, 433 U.S. 425, 468-69 (1977); *United States v. Lovett*, 328 U.S. 303, 315 (1946).

This case concerns another such limitation on Congress's power to exercise powers more properly assigned to the judiciary: Congress cannot prescribe the rule of decision for a pending case. This proscription recognizes that it is the province of the courts to interpret and apply the law to cases before them. It ensures that such determinations are not made by politicians, but rather by independent, impartial judges, and that they are made based on the evidence before the court, with all of the protections of the judicial process.

Several cases of this Court illustrate the limits of Congress's power to dictate the result in a case. In *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1852), the Court held that a proposed bridge over the Ohio River was a common law nuisance because it would have interfered with Congress's regulation of commerce on the river. Congress then passed a statute designating the roads leading to the proposed bridge to be postal roads that could not be obstructed. This designation of the bridge as a postal road, an act traditionally undertaken by Congress, permanently changed the operative legal framework for the Court's analysis. Accordingly, in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), which was not cited by the government here, the Court held that, under the new law regulating interstate commerce, the bridge would no longer be an impermissible obstruction.

In *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), the Court revisited this issue. An individual sued in the Court of Claims under an 1863 statute that allowed recovery of property captured during the Civil War, if the claimant could prove that he or she had not aided the rebellion. The claimant won the case in the Court of Claims based on an earlier Supreme Court decision that a presidential pardon proved conclusively that the pardoned individual had not assisted the rebellion and was entitled to the property. *See United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1870). However, while the case was pending in the Supreme Court, Congress passed a statute providing that: (1) a pardon could not used as evidence of the claimant's loyalty in support of a claim to captured property; (2) a pardon would be conclusive evidence of any acts of disloyalty recited in it, thereby precluding

recovery; and (3) upon proof of a pardon indicating disloyalty, the jurisdiction of the Court of Claims (and the Supreme Court with respect to appeals) would cease, and the case would be dismissed.

This Court held that the statute intruded into the judicial function because "the court is forbidden to give the effect to the evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary." 80 U.S. at 147. The Court distinguished *Wheeling Bridge* because "[n]o arbitrary rule of decision was prescribed in that case, but the court was left to apply its ordinary rules to the new circumstances created by the act." *Id.* 146-47.

The Court also held the jurisdictional bar unconstitutional because it was "founded solely on the application of a rule of decision, in causes pending prescribed by Congress." *Id.* at 146. Elaborating on the provision withholding appellate jurisdiction, the Court noted that it was no more than "a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this Court had adjudged them to have." *Id.* at 145, 146. Because Congress had prescribed a rule of decision in a case, even though it did so in the guise of its admitted authority to establish exceptions and regulations to the Supreme Court's appellate jurisdiction, the Court held the statute unconstitutional.[4]

The jurisdictional aspect of the holding in *Klein* indicates that this Court has refused to elevate form over substance in determining whether Congress has usurped the judicial function. *See also United States v. Lovett*, 328 U.S. 303, 315 (1946) (emphasis

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[4] In contrast to the statute at issue in *Klein*, the Court in *Hart v. United States*, 118 U.S. 62 (1886), upheld a statute that prohibited the payment of claims accruing before a certain date if the claimant had aided the confederacy in the Civil War. While the statute provided that a pardon did not remove this prohibition, it was silent as to the effect of a pardon on the merits of the underlying claim. The Court held that this statute was well within Congress's appropriation power and that it did not prescribe the effect to be given a pardon in determining the merits of a particular claim, as the statute in *Klein* had done, nor did it treat claims based on pardons differently than others in the class of claims.

added) (Bill of Attainder Clause proscribes all legislative acts "*no matter what their form*, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial"). Under *Klein*, if Congress cannot affirmatively require the courts to construe the evidence in a prescribed fashion or to reach a particular outcome in a pending case, then it cannot accomplish the same result by limiting the courts' jurisdiction to decide those particular cases.

This principle also follows from *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), in which an individual who had been imprisoned by Reconstruction military authorities brought a habeas corpus action challenging the constitutionality of the Reconstruction legislation. The lower court upheld the law, and McCardle appealed to the Supreme Court under the authority of an 1867 Act giving the Supreme Court appellate jurisdiction over habeas corpus matters. While the case was pending in the Supreme Court, Congress repealed the Act authorizing all such appeals, and the Court dismissed the case for want of appellate jurisdiction.[5] In doing so, the Court distinguished several cases involving "the exercise of judicial power by the Legislature, or of legislative interference with courts in the exercising of continuing jurisdiction." *Id.* at 514, *citing De Chastellux v. Fairchild*, 15 Pa. 18 (1850) (legislature attempted to exercise judicial power through a statute granting a new trial to an unsuccessful defendant in a trespass case); *State v. Fleming*, 26 Tenn. 152 (1846) (legislature interfered with judicial function by attempting to make a new law legalizing liquor sales applicable to pending prosecutions).

What these cases demonstrate is that the government's attempt to have the constitutionality of Section 318 turn on whether the statute uses certain magic words that actually "command" or "direct" a court to reach a certain result is hypertechnical and without constitutional foundation. Pet. Br. at 25, 30. It

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[5] The statute at issue in *McCardle* did not eliminate all Supreme Court consideration of habeas corpus petitions; it simply withdrew the Supreme Court's appellate jurisdiction, but left its certiorari jurisdiction intact. *Ex Parte Yerger*, 75 U.S. (7 Wall.) 85 (1869). In addition, the *McCardle* Court recognized that the lower courts still could hear such claims. 74 U.S. at 515.

does not matter whether the statute "directs" the court to dismiss a pending case, "deems" the challenged actions taken by the government to satisfy the underlying statutory requirements, or removes the court's jurisdiction to decide the particular case. All of these approaches are unconstitutional because Congress has, in essence, prescribed a rule of decision for the pending case.

In this case, there can be no doubt that Congress did just that. Congress "determine[d] and direct[ed] that management of areas according to" certain parts of Section 318 "is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases," which it identified by caption and docket number. Section 318 did not replace the requirements of the underlying environmental laws with other requirements. To the contrary, the conference report makes clear that "[t]his section in no way alters application of the Endangered Species Act or other environmental laws to the Forest Service and BLM management activities." Opp. Cert. App 122a. There is also no question that Congress adopted this statute to eliminate the injunctions that had been issued in these cases. S. Rep. No. 101-85, 101st Cong., 1st Sess. at 120 (1989) ("The Committee's immediate concern is the potential for considerable economic disruptions which are likely to occur if the injunctions remain in place").

This statute crosses the line between permissible lawmaking and impermissible congressional adjudication of a pending case. Section 318 directs the courts to resolve two pending cases in favor of the government and to remove the injunctions on timber sales. This is its principal purpose, and, if it is constitutional, its principal effect. It does this by referring to the cases by caption and docket number, and by directing the courts to find that whatever the agencies do under Section 318 satisfies the statutory requirements that are the bases of the plaintiffs' challenges in those cases.

The fatal flaw in Section 318 is even more apparent from what it does not do. It does not establish any rules of general applicability. Thus, it does not revise the substantive standards of the National Forest Management Act, 16 U.S.C. §§ 1601 *et seq.*, or the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701

et seq. Nor does it remove the courts' jurisdiction to decide all cases arising under the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, or any other statute. It likewise does not change the legal status of the public lands at issue in terms of their availability for timber sales, for example, by making them National Parks or wilderness areas, which would change the underlying circumstances much like the designation of the postal roads did in *Wheeling Bridge*. Rather than decide whether the legal obligations imposed by the environmental laws needed to be altered, whether certain categories of statutory claims should always be unreviewable in the courts, or whether the tracts at issue should be redesignated on a permanent basis, with all of the consequences that those determinations would have, Congress crafted a quick-fix solution that applies to this controversy and this controversy only, and even then for only one year.

This failure to enact rules of general applicability is significant both in terms of the result and the process. In terms of result, the specific claims in these cases were singled out as ones that would not be entertained by the courts during the fiscal year, not because they were based on erroneous legal standards that had since been changed, but because Congress did not like the result reached by the courts. This type of individualized lawmaking would be impermissible in the criminal context under the Bill of Attainder and Ex Post Facto Clauses, and would be unlikely to survive the Due Process Clause's rational purpose test for retroactive laws. *See* cases cited *supra* at 9.

In terms of process, the one-year, localized appropriations rider, targeted at specific cases, short-circuited the safeguards built into the lawmaking process. If Congress were to change the underlying legal obligations of the agencies under the environmental laws or the reviewability of agency actions under such laws generally, the legislation would go through the congressional committees with substantive responsibility over the laws and the agencies. Not only are the committee proceedings public, but the result -- the development of a general change in the law -- is the type of legislative action for which Members of Congress are held politically accountable. In contrast, last-minute appropriations riders are buried in voluminous budget bills that do not purport to

make substantive law and that are not subject to public hearings and review by the congressional committees with jurisdiction over the underlying laws or agencies.

In this case, Congress made no general changes in the underlying laws. Moreover, as the conference report makes clear, and as respondents, Seattle Audubon Society *et al.*, point out, Congress did not even exempt these agencies, this endangered species, or these timber sales from the underlying environmental laws. Thus, it did not even purport to make changes in the underlying laws specific to the matters at issue in these cases. In our view, such an exemption or limited repealer would also be unconstitutional, if it were simply a subterfuge for a congressionally established rule of decision for a pending case. Such shortcuts take place largely outside the accountable process of substantive lawmaking and inject Congress into the process of deciding cases without any of the safeguards of the judicial process.

Finally, it should be noted that the Executive Branch's defense of this particular statute is based on political expediency rather than principle. *Cf. Metropolitan Washington Airports Authority*, *supra*. Since Section 318 removed injunctions that were constraining the federal agencies' proposed actions, and derailed lawsuits against the agencies, it is not surprising that the Executive Branch liked the particular results of Section 318. However, the next case-specific rider may not be as palatable to the Executive Branch. Indeed, history shows that the Executive Branch has taken the opposite position when Congress passed statutes that allowed claims against the government to be relitigated. *See, e.g.*, *Pope v. United States*, 323 U.S. 1 (1944) (Executive Branch unsuccessfully argued that a statute removing statute of limitations defense, which had barred a previous claim in court, was an improper legislative encroachment on the judicial power); *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) (Executive Branch challenged statute that removed *res judicata* defense to claim previously litigated against it).

Even when the United States is not a defendant in an action for money damages, the Executive Branch might challenge provisions like Section 318. Thus, the Executive Branch would likely

oppose a statute directing the courts to find that a challenged regulation violated existing law or "deeming" the regulation's requirements to violate the law. Or, if a court invalidated an Executive Branch ban on a particular pesticide, and Members of Congress from the pesticide manufacturer's district sponsored a rider removing the appellate court's jurisdiction to hear the case, the Executive Branch might argue that Congress acted unconstitutionally. Likewise, if a court enjoined the Executive Branch from implementing a policy that limited the reach of a civil rights statute, and Congress passed a law providing that the injunction must remain in effect for one year, the Executive Branch would likely challenge the statute. In each of these situations, the Executive Branch might argue that such case-specific riders were congressional usurpations of judicial (and perhaps executive) power, without drawing any distinctions among the various means used to dictate the outcome of the case.

Regardless of whether a statute explicitly directs a court to reach a particular result in a pending case, deems an action to mean whatever is required to reach that result, or removes the courts' jurisdiction over the case, it is a violation of the doctrine of separation of powers. Accordingly, the court of appeals correctly found Section 318 unconstitutional.

CONCLUSION

For these reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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